Unity, Disunity and Vacuity: Constitutional Adjudication and the Common Law

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I. INTRODUCTION

The common law is often seen as a unifying and stabilising factor across and within jurisdictions; in the United Kingdom, for instance, the common law is appealed to as a familiar and certain alternative to the unpredictable and overweening impacts of European Human Rights Law.[1] This is in spite of the common law's propensity for reinvention, *and* in spite of the internal divisions and tensions within both the substance and methodologies of the common law. These ructions are in particular evidence in the *constitutional* common law and in the common law's approach to the resolution of fundamental constitutional conflict.

Though primarily regarded as the vehicle for the realisation of the private law of obligations, the last twenty years have seen the English common law assume a distinctly constitutional character.[2] The articulation of fundamental rights, though lacking the coherence and definitive character of a legislatively-endorsed bill of rights, had begun to form—prior to the sanction by statute of legislative review in the United Kingdom[3]—the backbone of a constitutional jurisdiction which aspired to partially regulate primary legislation for consistency with individual freedoms. Following the adoption of the Human Rights Act 1998, this nascent jurisdiction appeared to have reached its natural zenith, in the form of the principle of legality.[4] But renewed judicial recourse to rights protected by the common law,[5] alongside persistent claims as to the capacity of the common law as a control

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[1] Conservative Party, *Protecting Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014) 2.

[2] We acknowledge that the common law has long been considered to be an element of the broad constitutional fabric (eg AV Dicey, *The Law of the Constitution*, 10th edn (London, Macmillan, 1967) 196 ('Our constitution, in short, is a judge-made constitution, and it bears on its face all the features, good and bad, of judge-made law.') or as a component of the 'ancient constitution' (on which see JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge, Cambridge University Press, 1957)). In this piece, our focus is less on the place the common law within the constitution, more on the development and deployment by the courts of specific and substantive constitutional rights and principles.

[3] See Human Rights Act 1998, ss 3 and 4; Scotland Act 1998; Government of Wales Act 1998; Northern Ireland Act 1998.

[4] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131.

[5] eg *R (on the application of Osborn) v Parole Board* [2014] AC 1115; *Kennedy v Information Commissioner* [2015] AC 455; *A v British Broadcasting Corporation* [2015] AC 588.

on legislative action,[6] prompt consideration of the extent to which the common law can operate as a tool of proto-constitutional review.[7]

The development of a constitutional dimension to the common law has seen it proclaimed as undertaking functions akin to those performed by a written constitution.[8] Our enquiry is the extent to which the adoption of an explicitly constitutional dimension by the common law has prompted a departure from its accepted characteristics, holding the potential to destabilise its development. Judicial articulation of constitutional rights and statutes recognised at common law undoubtedly poses a challenge to the stability of the domestic constitutional order but also reveals a series of conflicts which threaten the capacity of the common law to unite or stabilise. Taking account of the incremental methods of the common law, its traditional adherence to doctrine and the judicial articulation of overarching constitutional principles, this paper examines the unity of the common law's constitutional features and the coherence of that constitutional common law within the prevailing constitutional order.

II. THE CONSTITUTIONAL AND THE ORDINARY

The Diceyan conflation of ordinary and constitutional law, as is well known, hindered the development of a distinct body of public law until the latter years of the twentieth century. *Droit administratif*, to Dicey, was 'foreign to the spirit and traditions of our institutions'[9] and undermined the idea of formal equality before the law. The consequence of this absence of a substantive distinction between the ordinary law and the nascent law applicable to public administration saw some of the most famous decisions in the canon grounded very firmly in private law causes of action.[10] Gradually, administrative law established for itself a

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[6] eg Lord Woolf, 'Droit Public—English Style' [1995] *PL* 57, 69; *R (on the application of Jackson) v Attorney General* [2006] 1 AC 262, [102] and [159]; *Moohan v Lord Advocate* [2015] AC 901, [35].
[7] For a thorough-going defence of the constitutional capacity of the common law, see: TRS Allan, *The Sovereignty of Law; Freedom, Constitution and Common Law* (Oxford, Oxford University Press, 2013).
[8] *Thoburn v Sunderland City Council* [2003] QB 151, [64].
[9] Dicey (n 2) 332.
[10] eg *Entick v Carrington* 95 ER 807 (1765).

distinctive character,[11] and procedural exclusivity saw the prerogative writs and orders reserved to the sphere of judicial review of administrative action.[12]

Emerging from this developing divergence, the common law has come to permit judicial scrutiny of administrative or executive powers, and increasingly can be seen to approach the subjection of legislative power to the controlling (or regulatory) influence of the common law. As such, the common law has begun to reveal the capacity to regulate not only executive or administrative discretion but also public power more broadly construed.[13] While a body of 'constitutional' laws can be described as the cumulative consequence of the development of judicial review and other cases dealing with the regulation of public power, such decisions have been bolstered through the ability of judicial review to touch upon the exercise of legislative power, and through the reflection of a distinctly 'constitutional' approach to judicial decision making.

The very idea of distinctly constitutional techniques of judicial reasoning is of course anathema to the orthodox Diceyan conceptualisation of constitutional law as the outgrowth of the ordinary law.[14] However, the image of a uniform terrain of laws is no longer—if it ever was—an accurate reflection of the UK's constitutional landscape. Practically, this transition is revealed in the increasingly complex evolution of the doctrine of implied repeal, a rule traditionally seen as the interpretive expression of that most orthodox and (once) sacrosanct constitutional doctrine—parliamentary supremacy. While implied repeal has been described as the doctrinal representation of the continuing supremacy of each successive Parliament,[15] faithful application of the doctrine also assumes—in normative and interpretive terms—equality of status among all legislation, an assumption that has been subject to challenge in recent decades.

The exposition of constitutional statutes by Laws LJ in *Thoburn* is heralded for piercing the myth of a plane constitutional surface.[16] This feat was accomplished by, firstly, differentiating the nature of constitutional statutes from ordinary legislation:[17]

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[11] The foundations of modern administrative law were only secured in the latter half of the twentieth century (see *Ridge v Baldwin* [1964] AC 40; *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; R Stevens, *The English Judges: Their Role in the Changing Constitution* (Oxford, Hart Publishing, 2005) ch 3).

[12] *O'Reilly v Mackman* [1983] 2 AC 237.

[13] As Cane observes, the target of administrative law is 'the day-to-day handling of public affairs particularly, but by no means exclusively, by what we call the "executive branch of government"' whereas 'constitutional law is concerned with the public domain in general' (P Cane, *Administrative Law*, 4th edn (Oxford, Clarendon Press, 2004) 1–2.

[14] Dicey, (n 2) 203..

[15] *Vauxhall Estates v Liverpool Corporation* [1932] 1 KB 733, 743 (Avory J).

[16] Cf *Ellen Street Estates v Minister of Health* [1934] 1 KB 590.

> We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes. […] a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.

However, perhaps more constitutionally consequential was the explanation of the interpretive consequences of that distinction—specifically, the insulation of constitutional statutes from implied repeal:

> Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act … to be effected by statute, the court would apply this test: is it shown that the legislature's *actual*—not imputed, constructive or presumed—intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes.[18]

On the basis of this reasoning, Laws LJ's constitutional hierarchy of statutes was not simply a descriptive label, but a categorisation with clear normative implications.

Thoburn has been characterised as evidencing a substantial, and dangerous, shift in the 'constitutional firmament'[19], yet, preceding Laws LJ's identification of constitutional statutes are earlier judicial suggestions of the existence of a hierarchical normative order. The House of Lords in *Nairn v University Court of St Andrews*[20] rejected an argument that the exclusion of women from the franchise in the 1868 Representation of the People Act was impliedly repealed by the Universities Election Amendment Act 1881 and the Universities Act 1889 which together permitted women's admission to universities and required women college members to be issued with voting papers. Finding that the 1868 Act was not impliedly repealed, and thereby maintaining the discriminatory law, Lord Ashbourne reasoned that '[i]f it was intended to make a vast constitutional change in favour of women graduates, one would expect to find plain language and express statement'.[21] There is

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[17] *Thoburn v Sunderland City Council* [2003] QB 151, [62].
[18] *Thoburn* (n 17) [63].
[19] J Young and D Campbell, 'The Metric Martyrs and the Entrenchment Jurisprudence of Lord Justice Laws' [2002] *PL* 399, 405.
[20] [1909] AC 147
[21] *Nairn* (n 22) [163].

demonstrative constitutional reasoning displayed in the judgment, complete with the ordering of norms and identification of fundamental laws—which clearly construed laws regarding the franchise as possessing superior constitutional status—despite that the consequences in rights terms were firmly against the grain of current constitutional thought and practice. *Nairn* stands out as a clear precursor to the constitutional layering subsequently realised—and rendered generally applicable to *all* constitutional statutes[22]—in *Thoburn* and subsequent case law on constitutional norms. With the endorsement of *Thoburn* by the Supreme Court in *H v Lord Advocate*[23] and *HS2*,[24] both the distinction between constitutional and ordinary legislation—and the interpretive consequences of such categorisation—were made concrete.[25] Indeed, the constitutionalisation of the common law was ushered along by the more exacting 'quasi-entrenchment' laid down in *H v Lord Advocate*, through Lord Hope's repeated incantations that *only* express enactment can result in repeal of a constitutional statue, thereby forestalling the possibility of repeal by irresistible inference as envisioned in *Thoburn*.[26]

Alongside the qualification of implied repeal through the discovery of constitutional statutes, the turn towards a constitutional common law has been anchored in and facilitated by the principle of legality. Lord Browne-Wilkinson's speech in *R v Secretary of State for the Home Department, ex parte Pierson*, outlined the basic limitations that the principle imposed on government:[27]

> A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.

Lord Hoffmann's subsequent formulation—in *R v Secretary of State for the Home Department, ex parte Simms*—explained the constitutional impetus for requiring a clear statement from Parliament:[28]

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[22] F Ahmed and A Perry, 'Constitutional Statutes' (2017) 37 *OJLS* 461, 463.
[23] [2013] 1 AC 413.
[24] *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] 1 WLR 324.
[25] *H v Lord Advocate* (n 23) [30]; *HS2* (n 24) [207]–[208].
[26] F Ahmed and A Perry, 'The quasi-entrenchment of constitutional statutes' [2014] *CLJ* 514, 520-21.
[27] *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, 575 (Lord Browne-Wilkinson).
[28] *Simms* (n 4) 131.

> [T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

Conceived of by Lord Hoffmann as primarily a vehicle for the realisation of individual rights, the 'canonical'[29] articulation of the principle of legality also indicates its secondary purpose, as a means by which English courts might enforce powers of review ('principles of constitutionality') not dissimilar to those exercised by explicitly constitutional courts. While the application of such principles would appear to fall short of providing overt support for a power of judicial strike down, they nonetheless appear to consciously position the court as a counter-majoritarian institution, capable of giving substantive effect to individual rights and constitutional principles via the processes of legislative interpretation.[30] To this extent—and to the extent that the principle permits derogation from the apparent intent underpinning primary legislation—the principle of legality is a bold departure for a constitution traditionally accustomed to a deferential judicial branch.[31] And though *legislative* development has also permitted the judiciary to wield constitutionally significant interpretative powers in defence of human rights,[32] as Philip Sales has recognised, the development of the principle of legality further evinces a tension between the ordinary and the constitutional: 'Section 3 of the [Human Rights Act 1998] and the principle of legality represent both continuity with earlier canons of construction looking to the object and purpose of the statute and various side constraints (such as the presumption against retrospective effect), and also a departure from them by reason of the greater interpretive discretion which they confer upon the courts.'[33]

But while rhetorically powerful, the force of the principle of legality is undermined by two significant practical considerations. The first is its apparent weakness as a constitutional

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[29] HWR Wade and CF Forsyth, *Administrative Law*, 10th edn (Oxford, Oxford University Press, 2009) 22.
[30] For a fuller account see R Masterman and JEK Murkens, 'Skirting Supremacy and Subordination: The Constitutional Authority of the United Kingdom Supreme Court' [2013] *PL* 800.
[31] Masterman and Murkens (n 32) 802–804.
[32] Human Rights Act 1998, s 3 (on the constitutional implications of which see A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge, Cambridge University Press, 2009)).
[33] P Sales, 'Partnership and Challenge: The Courts' role in Managing the Integration of Rights and Democracy' [2016] *PL* 456, 457.

protection for fundamental rights and principles; while Lord Hoffmann was able to proclaim the ability of the common law to restrain the application of unclear or uncertain legislative measures, he simultaneously conceded that (where legislative purpose is clear) Parliament continues to enjoy the ability to legislate absent legal constraints.[34] Second, the principle of legality's potency as a mechanism of constitutional restraint is undermined by difficulties relating to its application. It is axiomatic that the principle is contingent on the recognition and applicability of a right or fundamental principle existent at common law. Yet common law rights are—by their very nature—lacking in the definitional certainty of rights allocated under a Bill of Rights or other legislative instrument. Whatever vagueness persists in the definition of each right guaranteed in a Bill of Rights,[35] courts can be more sure-footed by reliance on both the wording of the rights provision and the context of the overall instrument. As such, and as creatures of the common law, the normative force of legislative endorsement to the catalogue of common law rights is also absent. In any invocation of the principle of legality it is imperative that the court address these issues of imprecision, lest the principle become a vehicle for the development of powerful, yet vague, limitations on legislative power.

Constitutional differentiation therefore gives rise to complex interpretive questions that have yet to be authoritatively answered. According priority to constitutional legislation over ordinary statutes and constitutional norms over ordinary policy is only the beginning, as courts must discover or formulate techniques to definitively identify constitutional rights, principles and statutes[36], determine the breadth of these constitutional precepts and resolve conflicts between them.[37] These pursuits are central to developing a mature constitutional jurisprudence, supplying the means for settling the substantive requirements of the constitution over time. The first point of departure in confronting these constitutional questions is that rather than constructing hard lines between constitutional and ordinary interpretive techniques, it is more accurate to view constitutional techniques as the evolution of 'ordinary' common law statutory interpretation and to understand both approaches as mutually educative. The difference between the two is more properly regarded as one of

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[34] *Simms* (n 4) 131. See also *R (Jackson) v Attorney-General* [2006] 1 AC 262, [159].
[35] On which see JAG Griffith, 'The Political Constitution' (1979) 42 *MLR* 1, esp 12–16.
[36] While Laws LJ identified a number of 'constitutional statutes' in *Thoburn*, his definition has been simultaneously criticised for being overly broad (G Marshall, 'Metric Measures and Martyrdom by Henry VIII Clause' (2002) 118 *LQR* 493, 495-496) and unduly narrow (Ahmed and Perry, 'Quasi-entrenchment' n (26).
[37] While *Thoburn* provides guidance on the reconciliation of conflict between an ordinary and a constitutional statute, the Supreme Court has declined to offer clear guidance on the resolution of conflict between two constitutional instruments (*HS2* (n 24) [208]).

degree rather than kind, which is not to elide constitutional and statutory interpretation but to better appreciate the nature and extent of the similarities and distinctions between these interpretive approaches. The connection between both sets of interpretive approaches is unsurprising, in part, because the issues which they seek to resolve track across constitutional and ordinary interpretation. Those central interpretive questions include firstly, whether 'the interpretation of a law [should] be governed mainly by its "letter", or by its "spirit"', and secondly, the extent to which the meaning of a written instrument should 'be determined by the original intentions, purposes, or understandings' of its drafters.[38] The interpretive continuity between constitutional and ordinary interpretation can be seen in the assistance constitutional courts interpreting codified constitutions in other common law nations have derived from familiar techniques of ordinary interpretation, for instance through marshalling reading in and reading down techniques as remedies.[39]

This continuity approach can be further buoyed by reference in UK courts to constitutional interpretative techniques adopted in other common law states, techniques which have shown some resonance in the implementation of the Human Rights Act 1998 and devolution legislation.[40] Signs of such incorporation are clearly in evidence in *Robinson v Secretary of State for Northern Ireland*,[41] where—through application of a 'generous and purposive' approach—a majority of the House of Lords was able to uphold the validity of elections to the Northern Ireland Assembly positions of First Minister and Deputy First Minister, notwithstanding that those elections had fallen outside of the timeframe apparently set down by the Northern Ireland Act 1998.[42] The requirement of generous and purposive interpretation has become a mainstay of constitutional and bill of rights interpretation in Commonwealth countries, and has been steadily recognised as applicable to the expanding category of UK constitutional statutes.[43] As *Robinson* itself demonstrates however, the adoption of interpretative approaches which seek to give effect to legislation in the light of a contextual assessment of legislative purpose may be in apparent tension with statutory

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[38] J Goldsworthy, 'Introduction' in J Goldsworthy (ed), *Interpreting Constitutions* (Oxford, Oxford University Press, 2007) 2.
[39] R Leckey, *Bills of Rights in the Common Law* (Cambridge, Cambridge University Press, 2015) 40.
[40] See *Brown v Stott* [2003] 1 AC 681, 703 (Lord Bingham, citing *Edwards v Attorney-General for Canada* [1930] AC 124, 136 (Lord Sankey LC)).
[41] *Robinson v Secretary of State for Northern Ireland* [2002] NI 390, [11]; D Feldman, 'The Nature And Significance of "Constitutional" Legislation' (2013) 129 *LQR* 343, 355–57.
[42] See Northern Ireland Act 1998, s 16.
[43] See, eg, *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326, 375; R Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal Law of Human Rights" under the Human Rights Act' (2005) 54 *ICLQ* 907, 913-15.

language, and therefore with those who would position the courts as responsive and (broadly) deferential to parliamentary language as the substance of primary legislation.[44] As such — and further illustrating continuity with the corpus of the common law—while generous and purposive methods of construction may be emergent features of the constitutional common law, they are by no means routinely embraced even in relation to the interpretation of constitutional legislation.[45]

III. INTERNAL AND EXTERNAL RESTRAINTS

The constitutionalisation of the common law through these methodological advances can be seen to pose challenges to multiple facets of common law unity. Fundamentally, the internal coherence of the common law is central to its utility as a stabilising force, a coherence that is potentially undermined to the extent that judicial reasoning employs constitutional techniques that outstrip current doctrinal progress. Though the common law is inherently evolutionary, its transformative impulses have been held in occasionally uneasy balance with countervailing tendencies towards stability and cohesion. The general tenor of judicial restraint in the development of the common law is tacit recognition that 'the common law is a process of law-making developed in a pre-democratic era, and maintained by a non-democratic form.'[46]

The internal restraint on common law adaptability in the form of the doctrine of precedent seeks to contain the 'evolutionary quandary' occasioned by common law developments.[47] Beyond the dilemma of reconciling the constancy and changeability of the common law, lies the danger that methodological engines of change will outpace doctrinal substance, thereby undermining both the stability and practicality of the common law. The common law's characteristic incrementalism hampers doctrinal and principle development to an extent that is not seen for methodology. The incremental method, in this regard at least, can be seen to tend towards the fragmentary; as Sir Robert Megarry VC noted in *Malone*, '[n]o new right in the law, fully fledged with all the appropriate safeguards, can spring from the head of a judge deciding a particular case'.[48] Though the common law may expand

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[44] *Robinson* (n 41) [65] (Lord Hobhouse). Cf Feldman (n 41) 492–496.
[45] *Imperial Tobacco, Petitioner* 2013 SC (UKSC) 153, [14].
[46] KD Ewing, 'A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary' (2000) 38 *Alberta Law Review* 708, 711.
[47] AC Hutchinson, *Evolution and the Common Law* (Cambridge, Cambridge University Press, 2005) 125.
[48] *Malone v Metropoitan Police Commissioner* [1979] 1 Ch 344, 372.

through the occasional development of new causes of action,[49] there has been no judicial attempt to list or compile those existing fundamental rights which are recognised, and may be protected, by virtue of the common law.[50] This may well be further evidence of the common law's incrementalism, but is also a symptom of the definitional uncertainty which attaches to common law rights; even Laws LJ—a full-throated defender of fundamental rights—has remarked that case law does not fully explain the meaning of the label 'constitutional rights'.[51]

The danger of an imbalance between methodology and substance is also demonstrated in judicial use of constitutional principle (which is discussed in further detail below). On the one hand, the common law's incremental development can be seen as a consequence of the (relative) certainty and predictability required of the rule of law, with constitutional principle serving to condition the extent to which legal change may be judicially-engineered.[52] The core requirements of the rule of law act as a brake on accelerated development by way of the common law, and serve to ensure that any such development remains 'judicial' rather than 'legislative' in character.[53] On the other hand, the precariousness of this imbalance is on full display in the pages of the *Jackson* judgment, which spoke to the constitutional fundamentality of rule of law as a means of restraining governmental powers but added little definition to the content of the principle, its normative force and the consistency of both with other potentially conflicting constitutional norms.[54]

The external aspect of the common law's unity encompasses on the one hand, the reconciliation of the methodology with prevailing norms of the polity, including—in the UK and Australia—parliamentary supremacy, and in other common law countries, the underpinning normative imperative of democratic will as represented in popular sovereignty (as expressed in statutes) and constituent power (as expressed in the Constitution). In a

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[49] See eg *Hosking v Runting* [2004] 1 NZLR 1.
[50] Extra-judicially, Lord Cooke of Thorndon attempted to list those rights which the common law recognised as 'constitutional'; he included: '… the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege … [the right of] participation in the democratic process, equality of treatment, freedom of expression, religious freedom … [and] the right to a fair trial' (Lord Cooke of Thorndon, 'The Road Ahead for the Common Law' (2004) 53 *ICLQ* 273, 276–277).
[51] *R v Lord Chancellor, ex parte Witham* [1998] QB 575, 585.
[52] Lord Bingham, 'The Rule of Law' [2007] *CLJ* 67,71
[53] On which see A Kavanagh, 'The Elusive Divide between interpretation and legislation under the Human Rights Act 1998' (2004) 24 *OJLS* 259, 270–274; G Phillipson and A Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74 *MLR* 878, 887.
[54] *Jackson* (n 36) [107] (Lord Hope), [159] (Lady Hale). See also *Reference re Manitoba Language Rights* [1985] 1 SCR 721 (SC, Canada) [59]; *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606 (SC, Canada)[43].

second, and increasingly important respect, the external face of the common law's unity speaks to its ability to foster connections and communications across common law states. Speaking to the second external manifestation, the importance of inter-common law communications has been highlighted by influential judicial figures, including Lord Toulson and Lord Cooke of Thorndon.[55] Lord Toulson has recommended 'the benefit which can be gained from knowledge of the development of the common law elsewhere', in a judgment in which he encouraged the 'citation of decisions of senior courts in other common law jurisdictions'.[56]

The external constraint imposed by parliamentary supremacy is perhaps a more serious indicator of potential inconsistencies between common law constitutionalism's ascendancy and longstanding constitutional pillars. The legislative supremacy of the elected branches must be accounted for in any convincing and durable constitutional development. There is consensus that the constitutional imperative of legislative supremacy rests in its expression of the majority will but to view it as an immutable *grundnorm* is misleading.[57] Parliamentary supremacy rests on the acceptance of both political and legal actors (constituted powers) and maintains its position on the basis of continued normative justification within the legal and political landscape.[58] Far from being simply 'a political fact', parliamentary supremacy is, and must be, defensible.[59] Consequently, the evolving shape of the doctrine must be—and has been—justified by normative reasoning. Such reasoning is evident in Lord Bridge's approach in *Factortame*,[60] which sought to uphold (and explain) the supremacy of EU law partly through discussion of the voluntary acceptance of limitations on Parliament's power and the necessity of EU law supremacy for the effectiveness of the Union's system of laws and regulations.[61] This approach achieved greater refinement and maturity in *HS2*, in which the UK Supreme Court developed a more assertive vision of both British constitutionalism and the courts' role in articulating the features of that constitutional landscape.[62] In explaining that the supremacy of EU law is insufficient to settle

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[55] Lord Cooke of Thorndon, 'Master Goff's Common Law Through Commonwealth Eyes' (The Inner Temple, 1996); Lord Toulson, 'International Influence on the Common Law' (London Common Law and Commercial Bar Association, 2014).
[56] *R (Guardian News & Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618, [88].
[57] NW Barber, 'Sovereignty Re-examined: The Courts, Parliament, and Statutes' (2000) 20 *OJLS* 131, 140–49.
[58] TRS Allan, 'Parliamentary Sovereignty: Law, Politics and Revolution' (1997) 113 *LQR* 443
[59] P Craig, 'Public Law, Political Theory and Legal Theory' [2000] *PL* 211, 211.
[60] *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603.
[61] P Craig, 'Britain in the European Union' in J Jowell, D Oliver and C O'Cinneide (eds), *The Changing Constitution* (Oxford, Oxford University Press, 2015) 123.
[62] *HS2* (n 24).

a conflict between EU law and a domestic constitutional norm, the Court was clear that such a conflict could only be resolved by the application of *UK c*onstitutional law in *UK* courts. The common law undoubtedly plays a role in allowing the courts to give voice to parliamentary supremacy, a role which has become all the more crucial in the years of constitutional renovation since the enactment of the European Communities Act 1972. This much is evident in *Miller*, where the necessity of parliamentary approval for the delivery of a formal notice of withdrawal from the EU was settled through the 'application of basic concepts of constitutional law'.[63] It is partly through common law reasoning—applying both principles of statutory interpretation and analogical historical argument—that innovations such as the supremacy of EU law and the interpretive and declaratory powers under the Human Rights Act 1998 have been integrated into the constitutional landscape and reconciled with its existing features.

Fundamentally, common law constitutional techniques quite consciously seek to thread the needle between defence of distinctly constitutional norms and respect for legislative will. As such, the principle of legality provides an interpretive mechanism through which courts can enforce common law rights and common law constitutional principles, while simultaneously acknowledging that a clear, unambiguous statement from Parliament would settle the matter. In this way the interpretive presumption serves to reconcile parliamentary supremacy and the rule of law and maintain effective inter-institutional interaction in the development of the constitution.[64] In sum, while at first glance the external unity of the common law appears under threat by the march of its constitutionalism, closer inspection reveals greater complexity in the external aspect of common law unity, which—at the least—indicates conceptual connections between prevailing constitutional norms and the common law as well as a reinforcement of the bonds between common law jurisdictions through common law constitutional dialogue.

IV. THE DEPLOYMENT OF CONSTITUTIONAL RIGHTS

The common law's doctrinal recognition of constitutional rights pre-dated the enactment of the Human Rights Act 1998, and sought to give a degree of legal recognition to the rights of

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[63] *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583, [82].
[64] A Young, '*R (Evans) v Attorney General*—the *Anisminic* of the 21st Century?' (*UK Constitutional Law Association Blog*, 31March 2015).

the individual in a constitutional system that had hitherto focused on wrongs and remedies. The means by which such rights could be asserted as against legislative action was relatively clear. To take the finding of the High Court in *Witham* as an example: the court found that the right of access to a court was a 'fundamental constitutional right'[65] recognised by the common law, and that it could not be limited other than by express wording in primary legislation or by secondary legislation whose parent statute provided for the power to make such restriction; 'general words,' Laws J indicated, 'will not suffice' for this purpose.[66] The stipulation was therefore that a right recognised by the common law as fundamental 'can only be denied by the government if it persuades Parliament to pass legislation which specifically—in effect by express provision—permits the executive' to place a limitation on that right.[67]

Yet in spite of the fact that, as a tool of proto-constitutional review, the recognition of freestanding common law rights amounted to a considerable advance for the common law, the traditional terrain of judicial review of administrative action did not demonstrate the same capacity to reinvent itself in order to provide better judicial protection for individuals.[68] Even in those cases in which common law rights could be said to be engaged, '… the courts' capacity to protect the relevant rights was limited by broad adherence to the conventional machinery of domestic administrative law.'[69] Additionally, this burgeoning jurisprudence of common law rights was undoubtedly stifled by the implementation of the Human Rights Act 1998. The Act—by contrast with the common law—provided a defined and expanded catalogue of rights,[70] specified how those rights might be asserted against both legislation[71] and public bodies[72] and made remedies available in the event that one of the protected rights had been unjustifiably infringed.[73] Problems of the definition and scope of the protected rights, issues which the common law had yet to confront in any meaningful way, were also to

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[65] *Witham* (n 55) 586.
[66] ibid 581.
[67] ibid 586.
[68] *R v Ministry of Defence, ex parte Smith* [1996] QB 517. Even post-HRA, the UK Supreme Court has declined to find that proportionality provides a free-standing head of judicial review at common law (*Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591).
[69] M Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68 *Current Legal Problems* 85, 89.
[70] Human Rights Act 1998, s 1.
[71] ibid ss 3 and 4.
[72] ibid s 6.
[73] ibid s 8.

be partially determined by reference to the extensive jurisprudence of the European Court of Human Rights.[74]

Following the enactment of the Human Rights Act, it was occasionally suggested that further expansion of fundamental common law rights jurisprudence might be a possibility,[75] but the view from the highest court appeared to suggest that constitutional common law rights were destined to remain a semi-formed quirk of the pre-Human Rights Act era.[76] The tide has however turned, with recent decisions emphasising the common law's continuing 'dynamic'[77] force in the arena of individual rights. Given broader socio-political concerns surrounding the 'Europeanisation' of the domestic laws of human rights, the assertion of a domestic alternative, or complement, to the 'incoming tide'[78] of Convention jurisprudence can be easily appreciated. There is also force in the arguments—made powerfully by Lord Reed in *Osborn*—that the Convention and its associated case-law is generally phrased at such a level of abstraction as to demand implementation at the 'national level *through a substantial body of much more specific domestic law*'.[79]

Though the common law framework of rights continues to evolve – with recent decisions acknowledging the existence of common law rights to liberty,[80] open justice,[81] and against self-incrimination[82] – its potential to independently act as a meaningful constraint on governmental power should not be overstated. First, and even acknowledging the sequential preference for consideration of common law authorities in domestic human rights adjudication,[83] the Supreme Court has acknowledged that application of the Convention rights – and the proportionality standard that the common law has hitherto declined to fully embrace[84] – will often require a more exacting standard of review.[85] Second, imprecision in the realm of common law rights has been compounded by a tendency towards restraint and deference to legislative will. In *Moohan* for instance, Lord Hodge—with whom four of the remaining six Justices agreed—was prepared to acknowledge that the right to vote could be

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[74] ibid s 2(1).
[75] *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, [71].
[76] *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, [62].
[77] S Stephenson, 'The Supreme Court's Renewed Interest in Autochthonous Constitutionalism' [2015] *PL* 394, 399.
[78] *Bulmer Ltd. v Bollinger SA* [1974] Ch 401, 418 (Lord Denning).
[79] *Osborn* (n 5) [55].
[80] *R (Lee-Hirons) v Secretary of State for Justice* [2017] AC 52.
[81] *Guardian* News (n 60).
[82] *Beghal v Director of Public Prosecutions* [2016] AC 88.
[83] R Masterman and S Wheatle, 'A Common Law Resurgence in Rights Protection?' [2015] *EHRLR* 57, 64.
[84] *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591.
[85] *A* v *British Broadcasting Corporation* (n 5) [57].

viewed as a 'basic or constitutional right'[86] but declined to find that the common law required that any derogations be 'provided for by law and … proportionate' as a result.[87] This was as a result of the fact that the common law's role had essentially been displaced by statute. In Lord Hodge's words:[88]

> … for centuries the right to vote has been derived from statute. The UK Parliament through its legislation has controlled and controls the modalities of the expression of democracy. It is not appropriate for the courts to develop the common law in order to supplement or override the statutory rules which determine our democratic franchise.

This finding is entirely consistent with the notion that the courts will be 'slow to develop the common law by entering, or re-entering, a field regulated by legislation'.[89] It is, of course, simultaneously inconsistent with an imperative to prioritise rights and require justification for interferences and confirms the current development of common law rights as lacking both the rigour and normative reach of their Convention-based counterparts.[90] Both characteristics combine to reduce the potential for the doctrinal application of common law rights to upset the orthodox hierarchy of norms stemming from the supremacy of the legislature. The same cannot necessarily be said for the judicial application of countervailing constitutional principles—a matter to which we now turn.

V. 'PRINCIPLES OF CONSTITUTIONALITY'?

The doctrinal unity of the common law's approach to judicial review is potentially challenged by its adoption of a more constitutionalised approach to adjudication. The adoption of an overtly constitutional approach sees a further bifurcation in the common law, as a result of which the relative *terra firma* of administrative law is abandoned in the application of more abstract, and principle-based, reasoning. The move away from administrative law doctrine forces recourse to principles of supposed general applicability which may lack the substance to effectively underpin legitimate judicial decision-making and which expose the limits of *principle unity* within common law constitutional adjudication.

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[86] *Moohan* (n 6) [31]. See also *Watkins* (n 80) [21] (Lord Bingham), [61] (Lord Rodger).
[87] *Moohan* (n 6) [34].
[88] *Moohan* (n 6), [34].
[89] *In re McKerr* [2004] 1 WLR 807, [30].
[90] See Elliott (n 69).

Classical understandings of the common law and the British constitution view both as essentially pragmatic systems that develop and evolve by finding practical solutions to problems. The drift towards reliance on constitutional principles raises questions to which Loughlin has given voice, chief among those being the ability 'to identify principles (the relatively easy bit) but also to unpack them and set them to work to resolve particular social disputes concerning the appropriate exercise of public power'.[91] Lord Hoffmann's speech in *Simms* saw an explicit linkage drawn between the meta-regulatory potential of the common law and the formal powers of constitutional review exercised by supreme or constitutional courts in comparator systems. Similarly, in *Thoburn*, Laws LJ indicated that the common law's recognition of constitutional statutes 'gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect'.[92] On this reading the principle of legality is positioned explicitly as a constitutionalist restraint – rather than a merely interpretative tool – hinting at its development as a means by which a relatively abstract common law constitution might be enforced. In parallel, emphasising the constitutional credentials of the principle serves to enhance the normative standing of the common law and implicitly rejects the traditional account of the 'negative' mandate in favour of judicial law-making, which regarded 'parliamentary interference [in the common law sphere] as unobjectionable.'[93] That such interference may no longer be seen as entirely unproblematic—and that this constitutional common law may enjoy a degree of resilience—has been indicated by the UK Supreme Court. In the *HS2* decision, the Supreme Court confirmed that constitutional law might be considered as apart from other law, *and* that constitutional principles might be resistant to even the superiority of EU law:[94]

> The United Kingdom has no written constitution, but we have a number of constitutional instruments. … The common law also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.

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[91] M Loughlin, 'Whither the Constitution?' in CF Forsyth (ed) *Judicial Review and the Constitution* (Oxford, Hart Publishing, 2000) 426.
[92] *Thoburn* (n 17) [64].
[93] Lord Devlin, 'Judges and Law-Makers' (1976) 39 *MLR* 1, 9.
[94] HS2 (n 24) [207].

As with common law rights, the articulation of constitutional principles poses particular difficulties when those principles are deployed as determinative, or partially determinative, tools of adjudicative reasoning. First, there may be disagreement as to the underpinnings or centrality of the claimed principle. A salient example—and one that has already been alluded to—is provided by the principle of parliamentary sovereignty. In the notable decision of *Jackson*, Lord Steyn said the following:[95]

> The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. *It is a construct of the common law. The judges created this principle*.

The consequence of this, as Lord Steyn went on to make plain, was that parliamentary sovereignty itself is a principle that might be moulded or amended by the judges.
Far then from being a *grundnorm*, sovereignty is—on this view at least—both a product of the common law, and potentially subject to its limiting force.[96] On this account, the supremacy of the legislature may be the 'dominant' characteristic of the constitution,[97] but it does not necessarily have *overriding* force. It is the nominal first amongst otherwise equal, but nonetheless potentially yielding, principles inhering within the system. The consequence of this for Lord Steyn was that—faced with legislative abrogation of another fundamental feature of the constitution—the courts would have to consider whether that characteristic was one that 'even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish'.[98] It fell to Lord Hope to confirm that while sovereignty may empower and legitimise the legislature, its necessary parallel is legal accountability to the courts; '[t]he rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based'.[99] The extent to which the rule of law might exert a restraining influence upon legislative powers was touched upon by Baroness Hale and Lord Steyn who postulated that the severe legislative restriction of judicial review, or insulation of executive activity from judicial scrutiny, may fall foul of the rule of law.

Though it is the obiter comments of Lord Steyn and Baroness Hale that were the most eye-catching, their suggestion that legislative sovereignty should yield in the face of

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[95] *Jackson* (n 36) [102] (emphasis added).
[96] ibid [126].
[97] ibid [104].
[98] ibid [104].
[99] ibid [107].

pernicious legislation which infringed the rule of law was not shared by the other judges. The then Senior Law Lord, Lord Bingham, in particular did not so readily agree that Parliament legislated subject to external controls:[100]

> The bedrock of the British constitution is, and in 1911 was, the supremacy of the Crown in Parliament ... Then, as now, the Crown in Parliament was unconstrained by any entrenched or codified constitution. It could make or unmake any law it wished. Statutes, formally enacted as Acts of Parliament, properly interpreted, enjoyed the highest legal authority.

Lord Bingham's use of the present tense is telling. While a number of his judicial colleagues clearly countenanced a shift in the constitutional landscape, Lord Bingham was less willing to concede that Parliament legislates subject to external constraints and made no reference to the common law heritage of the sovereignty principle. Two points can be illustrated through this judicial divergence. First, it is clear (perhaps trite) that significant disagreement exists as to the nature and scope of the potentially applicable constitutional principles. It is uncontroversial to say that even the foremost of those—parliamentary sovereignty—is a contested concept.[101] Such disagreement is also evident in those cases in which other constitutional principles are judicially advanced.[102] But the assertion that recognition of the legislative supremacy of parliament is a purely judicial creation, comes close to placing constitutional weight on the common law that its non-democratic structures cannot fully bear.

Second, the parallel appeal to the controlling influence of countervailing constitutional principles requires equal care in its unpacking. Judicial resort to broad constitutional principles is a less compelling mode of judicial argumentation than recourse to rather more precise sub-principles, or rules.[103] While the articulation of constitutional principles in the abstract is a common feature of judicial decision-making, those broad principles are best applied when distilled down into rather more precise, applicable, rules. This latter point is displayed in stark relief when the broad principle in question is being used in an attempt to qualify an exercise of Parliament's legislative power. In this regard, the contestability of legislative sovereignty is rather less problematic—due, perhaps, to the

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[100] ibid [9].
[101] *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, [50] (Lord Hope); Compare, for instance, TRS Allan, *The Sovereignty of Law* (n 7) with J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge, Cambridge University Press, 2010).
[102] In relation to separation of powers, compare, for instance, *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513, 555–568 (Lord Mustill) with *R v Secretary of State for the Home Department, ex parte Venables* [1998] AC 407, 518–527 (Lord Steyn).
[103] *Davidson v Scottish Ministers (No 2)* 2005 1 SC 7, [53].

democratic imprimatur that adheres to primary legislation—than the clarity and scope of whichever constitutional principle is invoked in order to limit legislative power.

VI. PRINCIPLE-BASED REASONING IN *R (EVANS) v ATTORNEY-GENERAL*

The Supreme Court decision in *R (Evans) v Attorney-General*[104] provides an illustration of the potential difficulties of reliance on constitutional principle in preference to doctrinal administrative law. The facts of the case revolved around the Attorney-General's issue of a certificate—pursuant to section 53 of the Freedom of Information Act 2000[105]—which had the effect of preventing disclosure of correspondence between the Prince of Wales and various government departments.[106] Evans, a journalist for the *Guardian*, pursued judicial review proceedings, seeking to quash the Attorney-General's certificate. The Divisional Court had dismissed his claim, while the Court of Appeal allowed his subsequent appeal (and granted the Attorney-General permission to appeal to the Supreme Court). The pertinent issue before the Supreme Court concerned the validity of the Attorney-General's certificate, with Evans arguing that section 53 'did not permit a certificate to be issued simply because, on the same facts and arguments, the accountable person took a different view of the public interest … when it came to the issue of disclosure'.[107]

A. A question of constitutional or administrative law?

The multiple judgments delivered by the seven-Justice bench in *Evans* were differentiated not only by their conflicting conclusions on the central question before the court. The judges were fundamentally divided on the appropriate framing of the issue regarding the validity of

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[104] [2015] AC 1787. For commentary and critical analysis see M Elliott, 'A Tangled Constitutional Web: The Black Spider Memos and the British Constitution's Relational Architecture' [2015] *PL* 539; TRS Allan, 'Law, Democracy and Constitutionalism: Reflections on *Evans v Attorney-General*' [2016] *CLJ* 38; R Craig, 'Black Spiders Weaving Webs: The Constitutional Implications of Executive Veto of Tribunal Determinations' (2016) 79 *MLR* 147.

[105] Section 53(2) confers a power on an 'accountable person' (in this case, the Attorney-General) to override a notice ordering disclosure by issuing a 'certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure' to comply with the relevant provisions of the Act.

[106] Prior to the issue of the s 53 certificate, release of the correspondence, referred to as the 'black spider memos', had been resisted by the various government departments (a decision upheld by the Information Commissioner), but ordered by the Upper Tribunal ([2012] UKUT 313 (AAC)). Communications with the Royal Family are now the subject of an absolute exemption from the provisions of the Act (Constitutional Reform and Governance Act 2010, s 46 and sch 7)).

[107] *Evans* (n 104) [46]. A secondary issue before the Supreme Court was the consistency of the Attorney-General's Certificate with EU Directive 2003/4/EC to the extent that the Certificate applied to communications about environmental matters (see [21]–[29], [98]–[113], [147]–[149], [167], [184]–189]).

the Attorney General's Certificate. Two critical approaches are evident, with Lord Neuberger (joined by Lord Kerr and Lord Reed) characterising the question as a constitutional issue and Lord Mance (who was joined by Lady Hale) treating the matter as a question of administrative law. In summary, the core focus of the administrative law enquiry was the legitimacy and/or reasonableness of the reasons underpinning the Attorney-General's certification. Lord Neuberger's constitutional law enquiry was more clearly focused on the compatibility of a power to issue such a certificate with the rule of law. The main dissent from Lord Wilson sought to deliver a response to both approaches, and can be characterised as conservatively constitutionalist as the more forceful elements of his speech were squarely directed at disputing Lord Neuberger's rule of law-driven 'constitutional' reasoning. The remaining Justice, Lord Hughes, also framed the issue as one of administrative law, though he departed from the findings of Lord Mance and Baroness Hale on the sufficiency of the reasons advanced in support of the Attorney General's decision.

It is the constitutional path chosen by Lord Neuberger that most clearly evidences the potential of the constitutional common law, and most clearly illustrates some of its potential pitfalls. Lord Neuberger's judgment focuses on the notion that executive override of a judicial decision 'cut[s] across two constitutional principles which are also fundamental components of the rule of law.'[108] The two fundamentals were identified as first, 'the basic principle that a decision of a court is binding …and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive' and second, that 'decisions and actions of the executive are, subject to necessary well-established exceptions … reviewable by the court at the suit of an interested citizen'.[109]

While Lord Mance, Lady Hale and Lord Hughes (the latter dissenting in part) saw the crux of the decision as lying in the adequacy of the reasons advanced by the Attorney-General for issuing the certificate under section 53 (with Lord Mance and Lady Hale finding those reasons inadequate for the purposes of issuing the certificate), the constitutional approach served to lift the issue from the minutiae of the Attorney-General's decision. Due to what Lord Neuberger described as the 'constitutional aspect'[110] of the case, both the issue of the certificate's validity and the consequences of the court's determination of that issue, became more general and broader in scope. This generalising of the issue occurred in two ways. First, far from viewing the matter as a concern discretely related to British

[108] *Evans* (n 104) [52].
[109] ibid [52].
[110] ibid [51].

constitutional law and principles, Lord Neuberger appealed to 'global' legal values, stating that an interpretation of section 53(2) of the Freedom of Information Act 'which entitles a member of the executive … to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom'.[111] Using this framing, the implications of the interpretation of section 53(2) would therefore extend beyond the provincial by undermining universal values which attach to the rule of law. Second, beyond a geographical expansion of the scope of the issue, elevating the issue from the detail of administrative law and situating it within the constitutional components of the rule of law suggests that the applicable principles are so fundamental that they not only contain independently applicable norms, but are also impervious to differing views on controversial questions. Lord Neuberger was overt on this score, as after describing the two principles, he explained their normative import in the following terms:[112]

> … the fact that the member of the executive can put forward cogent and/or strongly held reasons for disagreeing with the court is, in this context, nothing to the point: many court decisions are on points of controversy where opinions (even individual judicial opinions) may reasonably differ, but that does not affect the applicability of these principles.

This account of the rule of law approaches the understanding of constitutional norms that obtains in nations with entrenched constitutions, but is, of course, tempered by the acknowledgement that the principles apply domestically 'subject to parliamentary supremacy'.[113]

B. Enforcing the Rule of Law

Evans reinforces a trend in British constitutionalism—specifically the common law variety—for prioritisation of the relationship between individual and state while being less attentive and more tepid in addressing the relationship between organs of state. Mention of the most dominant of organisational constitutional principles—separation of powers—only appears in Lord Wilson's dissent.[114] While Lord Neuberger's judgment supplies some content to the often elusive rule of law by indicating two 'constitutional principles' that are said to be components of the rule of law, it avoids engagement with the more complex institutional

[111] ibid [51].
[112] ibid [52].
[113] ibid [52].
[114] ibid [171].

dilemmas engaged by both principles. In a larger sense, his judgment proves that the relative ease of identification of a constitutional principle is balanced—if not outweighed—by the difficulty of extracting and applying its component parts. While identifying the two relevant components as the principle that the decision of a court is binding (the finality principle) and the requirement that executive decisions be reviewable by the court (the reviewability principle), he failed to confront the complexities of both principles and the authorities that support their characterisation as *enforceable* 'fundamental components' of the rule of law.

Regarding the first of these, Lord Neuberger arguably overstates the certainty with which the finality principle finds support in the common law. He sought to support the finality principle using dicta from *M v Home Office*,[115] to the effect that the executive obeys the law as a matter of necessity rather than grace. But in the light of section 53, the circumstances in *Evans* are qualitatively different from that particular judicial review case. An executive override in reliance on the primary legislative authority of section 53 of the Freedom of Information Act—as in *Evans*—is distinct from the bare refusal of the Home Office Minister to comply with a court order on the basis of advice that the court acted outside its jurisdiction. Lord Neuberger does concede that the finality principle is subject to the contrary views of a higher court or to statute,[116] but goes on to say—even in the light of an available judicial review of the executive override—that 'it can be said with some force that the *rule of law* would require a judge, almost as a matter of course, to quash the executive decision.'[117] In portraying the finality principle as an effectively immovable object—even in the face of his apparent concession to parliamentary supremacy—Lord Neuberger offers only a partial account of the inter-institutional dynamics at play in *Evans*.

The latter point is also evident in Lord Neuberger's treatment of the reviewability principle. While this principle has achieved broad support and application from at least *GCHQ*[118] onwards, we are all too aware—particularly from cases involving the review of prerogative powers[119]—that given the right amount of deference, a deferential review might differ little in practice from non-justiciability. Reviewability is therefore a concept of varying

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[115] [1994] 1 AC 377, 395: 'the proposition that the executive obey the law as a matter of grace and not as a matter of necessity is a proposition which would reverse the result of the Civil War' (Lord Templeman).
[116] *Evans* (n 104) [52].
[117] ibid [53] (emphasis added).
[118] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
[119] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453.

colours and shades.[120] As such, it is unsurprising perhaps that the Justices unanimously recognised the reviewability principle but differed on the question whether that principle had been breached. And while the focus of the minority was on the reasons provided in support of the ministerial override, Lord Neuberger's deployment of the reviewability principle was subtly different. Lord Neuberger was particularly exercised by the potential for a certificate under section 53 to be issued on the basis of mere disagreement with a judicial finding in favour of disclosure,[121] finding that section 53 did not permit the issue of a certificate where, 'on the basis of the same facts and issues as were before a judicial tribunal',[122] the accountable person merely comes to a different assessment of where the public interest should lie. For Lord Neuberger the breadth of the statutory power – rather than the specific circumstances of its use in the instant case – was inherently problematic. It is questionable whether Lord Neuberger needed to stress the potential for a certification decision to be taken absent convincing reasons, with a certificate issued simply on the basis of disagreement likely to lack the 'reasonable grounds' required by s.53. But Neuberger's vision of reviewability – consistently with the broad tenor of his expansionary reasoning and reliance on overarching principle– is less focused on the reasons actually provided, and more driven by the bare compliance of the purported breadth of the statutory allocation of power with the overriding imperative of the rule of law. As such, deployment of the reviewability principle in Neuberger's judgment, is tantamount to an abstracted review of the statutory terms employed by Parliament in enacting s.53.

The vehicle through which the twin requirements of the rule of law are vindicated in *Evans* is the principle of legality. While *Evans* does not seek to resolve outstanding issues relating to the extent to which the principle will adhere to common law rights, it provides confirmation that constitutional principles—at the very least the rule of law—will not be taken to yield in the face of 'general or ambiguous' statutory language. As such, it focuses attention on the normative aspirations of the principle of legality. In the first instance, it appears to demonstrate that at the general level—as the conduit for the potentially wide-reaching requirements of the rule of law—the principle of legality can operate as a substantive, external, limitation on legislative power. At the more specific level, *Evans* also provides (conflicting) indicators as to the precision with which legislation may have to be

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[120] On which see M Taggart, 'Proportionality, Deference, *Wednesbury*' [2008] *New Zealand Law Review* 423, esp 451–454.
[121] *Evans* (n 104) [46], [50], [51], [52], [58], [59], [88], [89].
[122] ibid [50].

formulated in order to limit rights and/or constitutional principles. Thus, it remains unclear what form of wording is required for the courts to adjudge that the statutory language is clear enough to demonstrate that Parliament has 'squarely confront[ed] what it is doing and accept[ed] the political cost'.[123] Certainly, the plurality and the partial dissent penned by Lord Hughes revealed starkly different views on the clarity of the terms of section 53(2). Lord Hughes had no hesitation in concluding that the section 'can mean nothing other than that the accountable person … is given the statutory power to override the decision of the Information Commissioner, and/or of a court after appeal from the Commissioner, if he disagrees with it on reasonable grounds'.[124] By contrast, in Lord Neuberger's view, the section failed to satisfy the requirements of the principle of legality as it 'falls far short of being crystal clear'.[125] The level of clarity required in Parliament's expression requires resolution to stave off charges of judicial disobedience, but more fundamentally, some settlement must be reached whether the principle of legality has developed to accommodate potential disobedience to parliamentary expression/intent in the face of a countervailing and fundamental constitutional principle.

The cumulative impact of Lord Neuberger's principles of finality and of reviewability—as given effect in *Evans*—is considerable, in practice leaving section 53 an empty shell capable of application only in the narrowest of circumstances.[126] By contrast, the two principles of constitutionality combine to give considerable depth and reach to the common law's capacity to give voice to the rule of law. Lord Neuberger's iteration of the principle of legality additionally sets a high bar for the extent of statutory clarity required in order to legitimately restrict fundamental rights or the rule of law. The sum of this is the delivery of something akin to a stronger form of judicial review than has traditionally been evident in UK constitutional practice. In consequence, Elliott has assessed *Evans* as having performed 'radical constitutional surgery pursuant to the principle of legality.'[127] Others have been less charitable, accusing Lord Neuberger of effectively excising section 53 from the statute book.[128] While *Evans* most certainly contributes to debates around the incremental constitutionalisation of the common law – both through adding breadth to the principle of legality and through the overt judicial application of free-standing constitutional principle – it

[123] *Simms* (n 4) 131 (Lord Hoffmann).
[124] ibid [153].
[125] *Evans* (n 104) [58].
[126] On Lord Neuberger's reading, s 53 would, following a judicial finding in favour of disclosure, appear to be limited to those circumstances where there had been 'a material change in circumstances since the tribunal decision' or if that decision was 'demonstrably flawed in fact or in law' (*Evans* (n 104) [71]–[85]).
[127] Elliott, 'A Tangled Constitutional Web' (n 109) 546.
[128] R Ekins and CF Forsyth, *Judging the Public Interest: The Rule of Law vs the Rule of Courts* (London, Policy Exchange, 2015) 11.

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also serves to emphasise that in departing from the terra firma of administrative law (and perhaps also from the security of the sovereignty doctrine) both caution and clarity are required. If the unity and stability of the common law is to be maintained then it is beholden on the court to – through the application of fully reasoned and supported decision-making – provide shape *and* substance to its constitutional dimension.

VII. TOWARDS A COHERENT CONSTITUTIONAL COMMON LAW

The importance of method should be underscored in a context in which the resurgence of common law rights and principles can be discounted and minimised by claims that parliamentary supremacy will thwart attempts at strong judicial enforcement of common law norms. The methodological advances of the doctrine of constitutional statutes and the principle of legality lay a path for articulating and applying constitutional doctrine in interpreting legislation. Nonetheless, the continued adoption of new and innovative methodological techniques risks outstripping, and thereby undermining, both the doctrinal content of the constitutional common law and prevailing (and potentially countervailing) constitutional norms. If it is to be a credible and durable force, the emergent constitutional common law must achieve reconciliation with existent common law *and* constitutional tradition.

Similarly, if what we have referred to above as the meta-regulatory potential of common law constitutional principles is to be legitimately realised, then this cannot come at the expense of those characteristics that have in part secured the common law's distinctive position within the polity. If the constitutional function of the courts is to uphold the rule of law,[129] then the common law must, in both its substance *and* methodology, be reflective of such a commitment. Our concern is that seeking to substantiate—and enforce—principle-based constitutionalist reasoning holds the potential to undermine the stability of the common law, and therefore its legitimacy. This is not to suggest that the constitutional capacity of the common law is incapable of orderly development. We tentatively suggest that the common law's constitutionalist turn can be coherently and stably supported through observance of a studied approach that seeks to secure the constitutionalisation of the common law through its full reconciliation with internal and external restraints and completion (filling the gaps) of the doctrinal and principle foundations and requirements of common law constitutionalism. In

[129] *Miller* (n 67) [42], [151].

this light, the following approaches are recommended to usher along the balanced maturation of the nascent common law constitution.

A. Sustained Incrementalism

It is in 'the gradual construction of principle case by case'[130] that judicial power is kept in check, in recognition of the restrictions that principle and expertise place upon judicial activity. Maintaining an incremental approach would serve the twin objectives of respect for prevailing constitutional doctrines of parliamentary supremacy, the rule of law and separation of powers, and acknowledge limitations on the competence of the judicial organ. Such an approach does not bar fundamental changes or judicially-driven constitutional moments. Rather, it seeks to ensure that judges 'develop the law in a *judicial* rather than a legislative fashion; that is, on a piecemeal and principled basis that takes due account of pre-existing legal frameworks established by Parliament and previous judicial decisions'.[131] As a methodological or procedural restraint, incrementalism permits reasoned maturation of common law constitutionalism while respecting the constraints demanded by the nature of the common law and the British constitution.

The difficulty in articulating principles with any effective degree of specificity is, paradoxically, a result of the common law's pragmatic, evolutionary pace. While in the light of this the UK's highest courts have generally been cautious in their application of arguments based solely on abstracted constitutional principles,[132] this caution does not prevent the application and development of precedent by reliance on broader principles or judicial reasoning on *both* precise and general justificatory grounds. Lord Neuberger's judgment in *Evans*—while clearly supportive of the values of the rule of law—was arguably lacking the reinforcment of those specific authorities that would have substantiated his broader vision of the concept. If the principle of legality is to support a species of partially-abstracted legislative review, it must do so consistently with the common law's focus on the instant case in order to remain credible. In short, the courts may persist in giving substantive content to the rule of law, and thereby incrementally chart the contours of the common law's understanding of a 'rights-based democracy'[133], but should not lose sight of those

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[130] Sir John Laws, 'Judicial Activism' (*Judicial Power Project Blog*, 12 December 2016).
[131] Phillipson and Williams (n 57) 887.
[132] *Davidson v Scottish Ministers* (n 108) 7.
[133] On which see J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' [2003] *PL* 592, 597 and J Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] *PL* 671.

methodological characteristics of the principle—relative certainty, stability, predictability—that maintain its integrity and legitimacy.

B. Completing the constitutional circle

The common law's acceptance of a jurisprudence of fundamental rights—activated by a principle of legality capable of offering support where rights (and potentially constitutional principles) are undermined by inadvertent legislative action—undoubtedly provides a narrow basis for a fully-fledged constitutional jurisprudence. Recourse to the apex court in order to resolve, or partially resolve, constitutional problems—questions often at the intersection of law and political controversy[134]—has arguably already resulted in the extension of the principle of legality, which might bite upon infringements of individual, specified rights,[135] bundles of rights,[136] and (potentially unspecified[137]) constitutional principles.[138] In the field of rights protection, the principle of legality is described as having become equal in force to the interpretative direction contained in section 3(1) of the Human Rights Act,[139] and even some who see the principle as mandating a less robust protection of individual liberty nonetheless portray it as a vehicle for the broader management of judicio-legislative relations.[140] For the principle of legality to fulfil these expanding ambitions, the content and institutional implications of the constitutional principles it is claimed to protect must—alongside fundamental rights—be further developed.

The adverse consequence of the incremental development of the common law—for the development of a *constitutional* common law—has been to view precedents in isolation, rather than as components of a potentially cohering body of constitutional rules and principles. Hence, we clearly envisage *Entick v Carrington* as confirming the principle of government under the law, but have a less defined sense of how that particular requirement links to, and coheres with, other, broader, requirements of the rule of law.[141] The result of this is the tendency to narrowly regard precedents as judicially-applicable, and to be sceptical of principle-based reasoning of the type seen in *Evans*. If principle-based reasoning is to result

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[134] See eg *Jackson* (n 36) ; *Miller* (n 67).
[135] *Simms* (n 4).
[136] *Miller* (n 67) [87].
[137] *HS2* (n 26).
[138] *Evans* (n 104)
[139] E Bjorge, 'Common Law Rights: Balancing Domestic and International Exigencies' [2016] *CLJ* 220, 233.
[140] Sales (n 35)
[141] Again, the scholarship of TRS Allan provides a notable exception (in particular see TRS Allan, *Constitutional Justice: A Liberal theory of the Rule of Law* (Oxford: Oxford University Press, 2001)).

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in the vindication of constitutional principle, then it is beholden on the court to clearly bridge the gap between the applicable precedent(s) and the constitutional maxim to be vindicated.

If a constitutional common law is to flourish, and to range beyond the potentially inhibiting rights-focus of the principle of legality and common law rights jurisprudence, there is also a need for clearer articulation of constitutional principle *and* of the organisational/structural requirements of the constitution. Though *Evans* was in one sense very clearly about the interrelationship between Parliament, executive and courts, the virtual absence of explicit discussion of separation of powers[142] is illustrative of a decision that—while principle-based in its reliance on the rule of law—is otherwise lacking in its detailed consideration of a (perhaps *the*) key concept through which constitutional organisation and division can be articulated. Superficial engagement with separation of powers—also evident in other decisions of comparable constitutional standing[143]—is perhaps unsurprising in a system which has tended to be reflective of only a partial separation of governmental institutions.[144] Yet ongoing judicial failure to conceptualise the bases of institutional interactions reflects only an embryonic constitutional jurisprudence.

C. Critical comparativism

There is longstanding evidence of judicial awareness of the assistance that common law adjudication in any one jurisdiction draws from the experiences and understandings developed in other jurisdictions.[145] References to related cases in other states is also justified by, and builds on, the centrality of reason to common law method and development. Accepting reason as the basis for continual judicial refinement of the law, common law adjudication therefore resists firm jurisdictional containment. Thus, cross-jurisdictional common law unity is far from a relic of colonial days past.[146] From at least the 1990s, common law appellate bodies have explicitly endorsed developing the common law in one jurisdiction by reference to the law of other common law states. While that effort was more regularly demonstrated in innovations in tort law,[147] constitutionalisation of the common law has been greatly encouraged by reference to other states' experience with constitutional law.

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[142] *Evans* (n 104) [171].
[143] eg *Jackson* (n 36); *Miller* (n 67)
[144] On which see E Barendt, *An Introduction to Constitutional Law* (Oxford, Clarendon Press, 1998).
[145] See, eg, *White v Jones* [1995] 2 AC 207; *R v (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, [39]; *A v Secretary of State for the Home Department* [2006] 2 AC 221, [15]–[17].
[146] cf. C. Harlow, 'Export, Import. The Ebb and Flow of English Public Law' [2000] PL 240, 247.
[147] See *Invercargill City Council v Hamlin* Respondent [1996] AC 624] (New Zealand); J Stapleton, 'Controlling the Future of the Common Law by Restatement' in M Stuart Madden (ed), *Exploring Tort Law* (Cambridge, Cambridge University Press, 2005) 263.

Rather than being undermined by strides in common law adjudication, cross-jurisdictional common law unity has been fostered by such developments. Though not speaking directly to common law constitutionalism, Lord Reed's reflection 'that the approach to proportionality adopted in our domestic case law under the Human Rights Act has not generally mirrored that of the Strasbourg court', but has adopted 'a more clearly structured approach … derived from case law under Commonwealth constitutions', is testament to the synthesis occasioned by constitutional techniques in common law courts.[148]

Moreover, inquiry into foreign law would compensate for the United Kingdom's lack of prolonged experience with judicially-enforced constitutionalism. Highly instructive in this respect is the calibration of constitutional application of the rule of law in Canadian jurisprudence, culminating in increasingly specific derivation of principles from the rule of law, with a keen eye to precedents supporting claimed rule of law applications and to the restraining influences of constitutional text and countervailing constitutional principles. Thus the Canadian Supreme Court cautioned in *Imperial Tobacco* that however robust judicial enforcement of the rule of law, such protection must be conditioned by respect for parliament's legislative authority and the terms of the Constitution.[149] The tailored appeals to the rule of law in Canada and other common law jurisdictions could have provided meaningful guidance to Lord Neuberger's *Evans* judgment by helping to justify his claim to the globality of the rule of law principle of finality of judicial decisions as well as contributing to the resolution between judicial application of the rule of law and legislative expression. The wisdom of such pedagogical references to foreign law is underscored by the relative youth of assertive constitutional—as opposed to administrative—reliance on rule of law arguments by UK courts. The trials, errors and lessons of courts more experienced in this endeavor ought to inform the forward march of the constitutional common law.

VIII. CONCLUSION

The potential implications of the constitutionalisation of the common law can be seen in Lord Hodge's warning in *Moohan* that if 'a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare

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[148] Lord Reed, 'The Common Law and the ECHR' (Inner Temple, 11 November 2013)
[149] *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473 (SC, Canada) [66] – [68] (Major J)

such legislation unlawful.'[150] While often cast as judicial supremacy, the requirement that Parliament act consistently with constitutional principle can alternatively be seen as a natural consequence of the advance of constitutionalism in the UK. Rather than automatically resulting in the dominance of the judicial branch, the result would be more appropriately cast as a form of discursive constitutionalist model along the lines of the 'new Commonwealth model of constitutionalism'.[151] In fact, cross-institutional discourse is precisely what is at the heart of the principle of legality: it places a manner and form requirement on legislative activity, the results of which are scrutinized by the court, with room for Parliament to (re)assert its legislative intention.

Beyond tensions with parliamentary supremacy, if a constitutional common law is to flourish, avoiding the charge that its attendant rights and principles are essentially empty vessels, it must acquire the doctrinal underpinning and rigour that has accompanied the growth of administrative law in the post-War period. Furtive steps are being taken in this direction, most evidently in the resurgence of constitutional common law rights in the *Osborn* line of cases and in the concretisation of the doctrine of constitutional statutes in *HS2*. Simultaneously however, failure—or reluctance—to reinforce the principled underpinnings of this constitutional common law will not only fuel accusations of an over-mighty judicial branch and subjectivity in judicial decision-making but will also undermine the broader unity and stability of the common law.

[150] *Moohan* (n 6) [35].
[151] S Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge, Cambridge University Press, 2013). See also Masterman and Murkens (n 32).